

August 28, 2000

Ms. Ann Goode
Director
Office of Civil Rights
United States Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, D.C. 20460

Dear Ms. Goode:

In February, 1998, the United States Environmental Protection Agency (USEPA) issued its Draft Interim Guidance for Investigating Title VI Administrative Complaints (Interim Guidance). The document set forth proposed policies and procedures for investigating and resolving Environmental Justice complaints filed with USEPA regarding environmental permits issued by the states pursuant to delegated authority from the agency. While Title VI does not directly address the actions or activities of local governments, the City of Detroit recognized as did other local governments that implementation of USEPA's Interim Guidance would have a substantial, if not, significant impact on land use planning and economic development initiatives at the local level.

The level of concern was such that in June, 1998, we, in cooperation with the U.S. Conference of Mayors, hosted an open forum in Detroit to discuss these local government issues and to suggest revisions to the Interim Guidance to alleviate any adverse impact that implementation of the Guidance would have on land use planning and economic development. Subsequent to the forum, representatives of the City of Detroit presented these views to the USEPA Title VI Advisory Group at a meeting in Philadelphia.

On June 27, 2000, USEPA issued its Draft Agency Guidance for Investigating Title VI Administrative Complaints in two documents — "Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs" (External Guidance) and "Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits" (Internal Guidance). These documents reflect a substantial improvement in clarity and specificity of the Agency's proposed processes and procedures. While we appreciate the opportunity the USEPA has given to the City of Detroit, other municipalities, and stakeholders to exchange views and provide input into the process, our review of the Draft Guidance discloses suggested resolution of several of the issues of greatest concern to the City are not reflected in this document. Consequently, the City of Detroit makes the following comments and observations regarding specific provisions in one or both Guidances:

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The process does not provide adequate certainty that following the guidance will result in a positive outcome or prevent an Title VI investigation. The External Guidance sets forth numerous suggestions for addressing Title VI issues early in the process. Although these suggestions are quite specific in nature, there is no commitment on the Agency's part that following these guidelines will be viewed favorably in the evaluation of a Title VI complaint. While we recognize this is Guidance and not a promulgated rule, those states (and municipalities) who undertake, in good faith, extended outreach, community input, and enhanced scrutiny of permit applications should be given some assurance that complainants, at least, will be required to make a greater showing that a violation has occurred than would be the case in the absence of such efforts.

Traditional notions of standing are absent from the Guidance. The complainant need not reside in the target area or be among the "affected population." The Guidance appears to allow anyone to file a complaint and allege a violation of a permit action regardless of any possible or theoretical harm to the complainant or the population of which he/she is a member. This policy invites those outside of the community to "make mischief" without consideration for the concerns or expressed support of those within the community that hosts the permitted facility.

The Guidance extends the bounds of "notice pleading." Complainants are simply allowed to allege that a violation has occurred without more. Complainants should at least be encouraged to state the nature of the violation, why he/she believes the permit action violates Title VI and briefly describe the nature of the harm. Without these basic allegations, USEPA and the states will expend unnecessary resources and time and possibly delay the permittees activities during this investigation period.

Almost any permit action can trigger an investigation, regardless of purpose. Mere permit renewals can trigger a Title VI investigation even if the permittee is in compliance with all permit conditions. As the Draft Guidance states compliance with the environmental laws does not constitute per se compliance with Title VI. Additionally, even a permit for a new facility that requires state of the art controls not present in existing facilities can be the subject of a Title VI complaint and investigation. Our discussion with community groups discloses their concerns are with older facilities or those which do not fall within the permitting requirements of the state or federal government. Title VI does not address these concerns or the inequities that might be visited upon new or modernized facilities.

The Draft Guidance provides no clear definition of “affected population” and no clear standards for the selection of comparison populations. Again, the Draft Guidance attempts to infuse traditional civil rights standards into the environmental permitting process, it goes far beyond those standards. The states, permittees, and local governments are left to guess whether a particular area will be considered an Environmental Justice area and the geographic boundaries of such an area. Because there are no discernible standards for selecting a comparison population, cities like Detroit may be inappropriately compared to bedroom communities. From a process standpoint, it would appear that every permit must be subjected to area wide modeling to reach any discernible threshold that the permit decision will withstand Title VI scrutiny. Such modeling is time consuming, requires enhanced resources and may yet fail to yield a scientifically valid result.

The Draft Guidance allows a finding of adverse impact without concrete standards and can be based on a purely hypothetical basis. USEPA is free to use any assessment tool or observation it deems relevant to make this determination. At present, the conclusions drawn from risk assessment tools are, at best, debatable. The present state of USEPA rulemaking has yet to address standards for air toxics and other pollutants making enforcement of a finding of an adverse impact subject to legal challenges and rulemaking on a case by case basis. There should be some threshold on which states, local governments and permittees can rely.

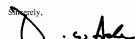
The economic benefit of the proposed facility must remain a justification. Whether or not the subject permitted facility provides direct employment to the affected population is nonetheless an important component to the health and safety of the affected community and to the local community at large. As stated above, new or modernized facilities often contain state of the art environmental controls that enhance environmental quality overall. Lack of economic development relegates the most disaffected communities to co-exist with less desirable uses that have fewer overall benefits and often lower standards of environmental accountability. Moreover, clean air is not quite so clean if bought at the expense of abandonment. There must be a balancing of the overall benefits of a facility and the environmental goals.

Finally, it remains troubling that the Title VI process is appended to, rather than integrated into the permitting process. Complainants are granted 180 days after the issuance of the permit to file an administrative action. By USEPA’s own timetable, resolution of a complaint can take a year or more. We recognize that the Title VI remedies are primarily addressed to the actions of the state and suspension or revocation of a permit may be rare. As a practical matter, companies faced with going through an extended review process will think twice about implementing their projects out of fear that the permit may be subsequently revised or that third parties will use the administrative complaint process as a linchpin for court actions that could disrupt construction or renovation. We urge USEPA to revisit this issue now and in the future to explore ways that Title VI concerns can be fully examined during the permit process.

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Again, we applaud the agency's efforts to clarify the process and to more fully define the substance of its Environmental Justice policies. We appreciate this opportunity and earlier opportunities to discuss these issues with you. We look forward to working with you in the future on this issue and other issues of concern to Detroit and our sister local governments.

Sincerely,

Sincerely,

Dennis W. Archer
Mayor

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Mayor, City of Detroit

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